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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1268

GEORGE MARTINEZ, *et al.*,

Appellants,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Appeal from the Court of Appeals of the State of California, Fourth Appellate District, Division One

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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Interest of *Amicus*

The State parole board in New Jersey has the statutory responsibility for determining when and under what

conditions inmates in the State correctional institutions may be released where, based upon review of the inmate's records, the ". . . board is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." N.J.S.A. 30:4-123.14. Pursuant to this standard, the parole board yearly considers approximately 3,000 to 4,000 parole release applications. The board grants parole in approximately 60% of these applications and denies parole in 40%.

Although members of the parole boards make every effort to reach an appropriate decision, there are bound to be situations where with the benefit of hindsight it could be said the decision was ill-advised. In fact, there is at least one similar suit currently pending in the courts of New Jersey. A reversal of the Court of Appeals decision in the case and a removal of the protection of absolute immunity would, therefore, subject parole board members to substantial potential liability to the general public arising from the occurrence of such unfortunate incidents. Moreover, there would be no justifiable basis for distinguishing between liability to the general public and liability to the inmate who might feel that his civil rights had been violated as a result of the parole adjudication. The adverse implications are significant. Parole members will be torn between fear of litigation by a parolee's potential victim and fear of litigation by dissatisfied inmates. These countervailing concerns will be bound to intrude substantially upon what is already an exceedingly difficult adjudication. A particular determination is likely to weigh more

heavily in favor of denial or grant of parole based solely upon the relative strength of the countervailing fears. Moreover, removal of the absolute immunity protection will make the State's task of finding qualified individuals to serve as members of parole boards a far more difficult task than it already is. Thus, it is clear that the State of New Jersey has a vital interest in insuring that the Court of Appeals decision is affirmed.

ARGUMENT

In adjudicating whether a particular inmate should be paroled, the members of the Parole Board are not liable under 42 U.S.C. §1983 for injuries caused by the parolee to members of the public.

A

The complaint does not state a §1983 cause of action because it does not allege a deprivation of a due process protection by the Parole Board owed to a potential victim of a parolee and because the injury was not caused by the Board.

Initially, although not decided by the Court of Appeals of California and therefore technically not an issue in this case, there must be significant doubt that the action by the parole board in granting parole is sufficient to support a 42 U.S.C. §1983 claim of constitutional deprivation. 42 U.S.C. §1983 imposes civil liability only upon one:

> ". . . who, under color of any statute, ordinance, regulation, custom, or usage of any State of Terri-

tory, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . .*" (emphasis added).

The bald assertion by appellants herein that the mere adjudication by the parole board granting parole in this case violated decedent's Fourteenth Amendment protection against deprivation of life without due process stretches 42 U.S.C. §1983 and the Fourteenth Amendment far beyond their intended scope.

There can be no §1983 cause of action in this case against the parole board because it was not the board's action which deprived the decedent of her life. As this Court stated in *Baker* v. *McCollan,* —— U.S. ——, 99 S.Ct. 2689 (1979), a public official is liable under §1983 only "if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights. . . ." 99 S.Ct. at 2693. *Cf., Rizzo* v. *Goode,* 423 U.S. 362 (1976). See also *Jamison* v. *McCurrie,* 565 F.2d 483 (7th Cir. 1977). Moreover, the Fourteenth Amendment provides that "no *state* shall . . . deprive any person of life, liberty, or property. . . ." (emphasis added). No causal nexus exists in this case between the parole adjudication and the commission of the crime by the parolee and the deprivation of life was not the result of governmental action. In this respect, appellants' reliance upon *Wolfer* v. *Thaler,* 525 F2d 977 (5th Cir.), *cert.* den. 425 U.S. 975 (1976), *Mattis* v. *Schnorr,* 502 F.2d 588 (8th Cir. 1974), and *Brazier* v. *Cherry,* 293 F.2d 401 (5th Cir.), *cert.* den., *sub nom, Cherry* v. *Brazier,* 368 U.S. 921 (1961), is misplaced. In those cases the victims were allegedly shot

or beaten to death by state officers. In *Alvarez* v. *Wiley,* 71 Cal. App. 3d 599, 139 Cal. Rptr. 550 (1977) and *Spence* v. *Staras,* 507 F.2d 554 (7th Cir. 1974), the victims were injured while in the custody of state officials. In the present case, the victim was neither killed by state officials nor killed while in the custody of state officials. In fact there was no relationship whatsoever between the parole board members and the victim. She was simply the unfortunate victim of a tragic murder perpetrated by a lawfully released parolee. It would clearly be an unprecedented expansion of the Fourteenth Amendment due process protection if §1983 were construed to provide a cause of action to appellants.

Furthermore, the ramifications of appellants' theory are enormous. If a Fourteenth Amendment violation occurs where a private person commits a crime, the theory of appellants' cause of action extends far beyond the parole board in this case. For instance, it would mean that local police, who are never able to provide protection against all crimes, would be subject to suits by the aggrieved parties who have, as a result of the criminal conduct, been deprived of property or life. It is inconceivable that the Fourteenth Amendment and §1983 were intended to so expansively subject government to liability where the injury occurs at the hands of a private person. See *Reiff* v. *City of Philadelphia,* —— F.Supp. —— (D. Pa. 1979), 48 U.S.L.W. 2039 (June 25, 1979).

Furthermore, beyond the fact that there is no state action involved in this case, there is no due process protection afforded by the Fourteenth Amendment to appellants' decedent which the parole board violated. Although the specific boundaries of the protection afforded by the Fourteenth Amendment have not been defined, this Court's recent decision in *Baker* is instructive. In that case re-

spondent was mistakenly arrested by local police and detained in jail for eight days. Although recognizing that a denial of liberty had occurred, this Court held that since the arrest was accompanied by a warrant, the validity of which respondent did not challenge, respondent's detention had been accompained by all the process that was due him under the Constitution. In rejecting the Court of Appeals holding that the police were obligated by the Fourteenth Amendment to "exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant," this Court stated:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . ." 99 S.Ct. 2695-2696.

Although the present case involves an alleged wrongful deprivation of life, as opposed to the deprivation of liberty in *Baker,* the absence of any violation of constitutional due process protection is, if anything, more evident. The closest appellants have come to articulating the process that was due decedent at the time the Parole Board adjudicated the matter is a reference in the third count of the complaint to a "duty to warn probable victims" of the release of the inmate (Ab6). The proposition that such a duty is a constitutional due process requirement is far more astounding than was the duty to insure proper identification procedures asserted in *Baker.* While the Constitution does require a parole board to afford inmates certain procedural protections, *Greenholtz* v. *Inmates of Nebraska Penal & Cor.,* —— U.S. ——, 99 S.Ct. 2100 (1979), it has never been extended to require separate procedural protections to potential "victims" of parolees. This Court has recently observed:

> "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations . . . This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole." *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex, supra,* 99 S.Ct. at 2104.

Application of the Fourteenth Amendment due process requirement to this case imposing an obligation upon a parole board to require, as appellants suggest, notice to a potential victim, would result in a constitutional duty that could never be fulfilled since the identity of a prospective parolee's potential victim, if any, could never be ascertained at the time of the parole adjudication. Consequently, under appellants' construction of §1983 and the Fourteenth Amendment, the parole authorities would be subject to potential liability everytime a parolee commits a crime. The result would be a constitutional protection afforded unknown potential victims of parolees which far exceeds that afforded those individuals whose liberty is directly under the parole boards' control. As this Court observed in *Baker,* the Fourteenth Amendment does not protect against all deprivations of liberty or life, but only against deprivations accomplished "without due process of law." 99 S.Ct. at 2695. As in *Baker,* there was no due process obligation owed to appellants or the decedent by the parole board, and therefore no deprivation thereof.

In sum, it is evident that a §1983 cause of action does not exist in this case. The parole adjudication of the board violated no constitutional due process protection of

the decedent victim. Moreover, it was not state action which caused the death of the decedent but rather the commission of a crime by the parolee.

B

The parole adjudication is a quasi-judicial function; members of a Parole Board are therefore clothed with absolute immunity against actions based upon an exercise of that function.

It has long been held that members of the judiciary are immune from civil actions, including suits under 42 U.S.C. §1983, for their judicial acts. The immunity is absolute and applies even where such acts a in excess of their jurisdiction or are alleged to be malicious or corrupt. *Stump* v. *Sparkman,* 435 U.S. 349 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

The absolute immunity provided judicial officers has not been limited to officers of the judicial branch. Although this Court has held that ordinarily officials of a state executive branch of government enjoy only a qualified immunity under 42 U.S.C. §1983, *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), it has also held that the quasi-judicial functions exercised by certain officials of the executive branch clothes them with the same type of absolute immunity enjoyed by judicial officers. For instance, in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), such absolute immunity was extended to state prosecutors. More recently, in *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court extended the protection of absolute immunity to administrative hearing officers and administrative law judges as well as those agency officials who perform functions analogous to those of a prosecutor, such as determining whether an administrative proceeding should be initiated and determining an appropriate sanction. Similarly, agency attorneys conducting an administrative proceeding and presenting evidence on the record to the hearing officer or administrative law judge enjoy absolute immunity.

In reaching this decision, this Court determined that adjudications within an administrative agency share many of those characteristics of the judicial process which require absolute immunity. For instance, the conflicts which administrative hearing officers must resolve are as "fractious" as judicial conflicts and therefore just as likely to result in an attempt by a dissatisfied party to challenge the decision. Further, similar to the judicial process, the process of agency adjudication is structured such that the hearing officer or administrative law judge must exercise his judgment solely upon the evidence before him. Thus, this Court found the risk of an unconstitutional act by such officer reduced. Similarly, with respect to the state official functioning as a prosecutor in determining whether to bring an administrative action and to seek particular sanctions and in presenting evidence at an administrative hearing, the Court noted the need to insure that the exercise of the broad discretion involved is independent and free from fear of future law suits, noting the "serious danger" that a decision to authorize proceedings or to present certain evidence or witnesses will provoke retaliatory responses. On the other hand, the potential for unconstitutional acts was found to be reduced by the opportunity afforded a party in an enforcement proceeding to challenge the legality of the determination to bring the proceedings by argument to the hearing officer and to challenge the presentation of evidence and witnesses through cross-examination.

The application of absolute immunity to parole adjudications, if anything, is even more appropriate. Such adjudications have consistently been considered quasi-judicial in nature, necessitating the application of absolute immunity. *Thompson* v. *Burke*, 556 F.2d 231 (3rd Cir. 1977); *Pope* v. *Chew*, 521 F.2d 400 (4th Cir. 1975); *Keeton* v. *Procunier*, 468 F.2d 810 (9th Cir. 1972), *cert.* den. 411 U.S. 987 (1973); *Silver* v. *Dickson*, 403 F.2d 642 (9th Cir. 1968), *cert.* den. 394 U.S. 990 (1969); *Pate* v. *Alabama Board of Pardons and Paroles*, 409 F.Supp. 478 (M. D. Ala. 1976), aff'd 548 F.2d 354 (5th Cir. 1977); *Bricker* v. *Michigan Parole Bd.*, 405 F.Supp. 1340 (E.D. Mich. 1975). These cases recognize that, unlike the executive officials and school board members in *Scheuer* and *Wood*, members of parole boards in granting, denying or revoking parole act in a quasi-judicial capacity and in effect are an extension of sentencing functions performed by judges. In fact, this Court has recently characterized such parole determinations as ". . . much like a sentencing judge's choice . . . to grant or deny probation . . ." *Greenholtz* v. *Inmates of Nebraska Penal & Cor., supra*, 99 S.Ct. at 2108.

The need for free exercise of judgment in the parole adjudication context is even more apparent than is the need for such freedom in administrative hearings. Parole adjudications are highly predictive and subjective. As a result, there is no ideal, error-free way to render a parole decision and the process of necessity is to a large degree experimental. As this Court in *Greenholtz* v. *Inmates of Nebraska Penal & Cor.*, 99 S.Ct. at 2107 noted:

> "In parole releases, like its siblings probation release and institution rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observations filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others and undermine respect for the administration of justice. The entire inquiry is, in a sense, an 'equity' type judgment that cannot always be articulated in traditional findings."

Further, reversal of the Court of Appeals in this case is likely to lead to a sacrifice of the strong policy encouraging rehabilitation in favor of the countervailing policy of deterrence and to encourage a multiplicity of litigation by inmates whose parole has been denied out of an overbundance of concern over litigation by a potential victim. This clearly would be a undesirable result.

In a case involving facts strikingly similar to the facts herein (parolee raped and murdered plaintiff's daughter) in which absolute immunity was applied, it was observed by the court that:

> "Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence or granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those

> who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations." *Pate* v. *Alabama Board of Pardons and Paroles, supra,* 409 F.Supp. at 479.

Because of the highly sensitive, predictive nature of parole decisions, the proceedings are not as formalized as, for instance, the administrative hearings considered in *Butz.* However, the adjudication must be based upon the inmate's record, the inmate must be afforded an opportunity to be heard and to insure that his records are accurate and the inmate must receive notice of the adjudication. Moreover, the inmate ordinarily may challenge the parole determination in court. Thus, there are some procedures required in parole proceedings which do protect against an erroneous decision. It is, moreover, evident that while such protections are factors to be considered in determining whether absolute immunity applies, it is clear that they are not the overriding factors, particularly where, as here, the countervailing necessity for the protection afforded by absolute immunity far outweighs the concern for error-free judgment. And, while the more formalized procedures afforded in administrative hearings and Court proceedings might provide protection to the parties against unconstitutional decisions, it is not the interests of the parties which are involved herein. Appellants seek protection for the parolee's potential victim, a member of the general public. The safeguards of the administrative and court proceedings

provide no more protection to this category of individuals than would safeguards in the parole procedures.

In sum, parole adjudication is clearly quasi-judicial in nature. There is, moreover, a significant need to insure that such adjudications are protected against potential suits for damages, particularly in view of the highly predictive and subjective nature of the adjudication. Although safeguards afforded by the procedure to protect against unconstitutional decisions are not as extensive as those which accompany judicial and administrative hearing decisions, the potential for unconstitutional adjudication is far outweighed by the need to insure a free exercise of parole judgment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of the State of California should be affirmed.

Respectfully submitted,

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